No. 84-312

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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*CHARLES STEPHEN RALSTON
JULIUS LEVONNE CHAMBERS
99 Hudson Street
10th Floor
New York, New York 10013
(212) 219-1900

WALTER B. SLOCOMBE
GEOFFREY JUDD VITT
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 862-5000

BORIS FELDMAN
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-3607

M. CAROLYN COX
WILMER CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-4103

Attorneys for Respondent

**Counsel of Record*

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QUESTION PRESENTED

Whether, under since-abolished eligibility procedures, charities which use litigation to serve health and welfare purposes could, consistent with the First Amendment, be excluded from the Combined Federal Campaign, for which health and welfare charities that use other methods were eligible.

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BRIEF IN OPPOSITION

STATEMENT

Respondents are seven charitable organizations concerned with the protection of the rights of minorities and women or with protection of the environment that were found on the record in the case to serve health and

welfare purposes.[1] This case involves whether respondents could constitutionally be barred, under since-abolished eligibility procedures, from participation in the Combined Federal Campaign, for which health and welfare charities generally were eligible, on the ground that they advance their goals in part by litigation.

The Combined Federal Campaign (CFC), access to which is at issue in this case, is the only means by which charities may solicit federal civilian and military personnel at their workplaces. Government-wide rules for charity solicitation of federal employees were first established in 1957 to provide national structure for the widespread, but unregulated, federal workplace solicitation which had taken place prior to that time. A succession of Executive Orders and pronouncements by the Civil Service Commission and its successor, the Office of Personnel Management (OPM), have since been promulgated governing this solicitation.

One provision of the rules for the CFC, as they existed in the 1960's and 1970's, limited participation to charities "providing direct services to persons in the fields of health and welfare services." U.S. Civil Service Commission, *Manual on Fund-Raising Within the Federal Services* § 5.21 (1977). Relying on this "direct services" requirement, OPM in 1980 rejected applications to the CFC by two of the respondents here, NAACP Legal Defense and Educational Fund

[1] The respondents are, in addition to the NAACP Legal Defense and Educational Fund, Inc., the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal and Education Fund, the Indian Law Resource Center, the Lawyers' Committee for Civil Rights Under Law and the Natural Resources Defense Council.

and Puerto Rican Legal Defense and Education Fund. When those two organizations challenged the exclusion, the "direct services" standard was held unconstitutionally vague in *NAACP Legal Defense and Educational Fund* v. *Campbell,* 504 F. Supp. 1365 (D.D.C. 1981). As a result, the two organizations participated in the 1981 campaign.

Late in 1981, petitioner tried to persuade the President to issue an executive order excluding respondents and similar organizations from future CFCs on the ground of incompatibility with the Administration's budget priorities. I J.A. 70, 72. That proposal was, however, rejected and those two organizations continued in the 1982 campaign. The other respondents also applied and were admitted in 1982. The 1982 campaign, like the 1981 effort, set a fund-raising record. II J.A. 553.[2]

Petitioner renewed his effort to bar respondents and similar charities. On February 2, 1983, he forwarded to the White House another set of proposed Executive Order provisions intended for that purpose. I J.A. 106-113. In addition to repeating and elaborating on the requirement that CFC participants provide "direct health and welfare services," the proposed order flatly declared, "Agencies that seek to influence . . . the determination of public policy through political activity or advocacy, lobbying or litigation on behalf of parties other than themselves shall not be eligible" for the CFC. Executive Order 12404, embodying these provi-

[2] Final results for the 1982 campaign exceeded the preliminary figures available to the District Court. The 1982 campaign produced $100,737,667, a 6.42% increase over 1981. CFC Memorandum 83-15, 16 (Nov. 28, 1983).

sions was issued on February 10, 1983. 48 Fed. Reg. 6685 (1983).

Respondents' challenge to the validity of the exclusionary provisions of the new Executive Order was sustained by the District Court. 567 F. Supp. 401 (D.D.C. 1983), *reprinted* at Ptn. App. 84a. The court held that under the standards of *Perry Education Assn.* v. *Perry Local Educator's Assn.*, 460 U.S. 37 (1983), the CFC was a limited public forum established by the federal government for the purpose of regulating workplace solicitations of charitable gifts, that respondents fell within the "limits of that forum as it historically existed" and that the exclusion of respondents on the basis that they sought to achieve their charitable objectives by litigation was a content-based restriction. The Court concluded that the exclusion failed to meet the requirement that content-based restrictions on access to a limited public forum serve a compelling governmental interest. The argument that such groups could be excluded because they were controversial was rejected not only as inadequate as a compelling state interest, but also as "impermissible." While the Court recognized as legitimate the government's interest in avoiding the appearance of endorsing particular groups, it nevertheless held that that purpose could be served by a disclaimer in the solicitation materials without excluding any group. Accordingly, it enjoined the use of the exclusionary provisions of the Executive Order to bar respondent from seeking "designated" contributions in the 1983 CFC.[3] Respond-

[3] Federal employees may either "designate" their gifts to the CFC for a particular recipient, or give to the CFC generally. These "undesignated" funds—roughly a third of the total in 1983

ents' claim for eligibility to share in the distribution of undesignated funds (given the CFC as a whole and not to a particular charity) was dismissed and has not been appealed.

As a result of that order, respondents applied to the 1983 CFC and were granted national eligibility,[4] along with 150 other charities.[5] The 1983 campaign, like the earlier campaigns in which respondents participated, set a new record—$110.4 million—for total funds raised.[6]

While the 1983 CFC was being conducted subject to the District Court order, petitioner appealed that order. The United States Court of Appeals for the District of Columbia Circuit agreed that respondents could not constitutionally be excluded from the CFC

—are distributed at the discretion of the "Principal Combined Fund Organization" (PCFO), usually the United Way.

[4] The order did not guarantee participation in the CFC. Respondents remained subject to the other requirements for national CFC eligibility, e.g., breadth of public support, integrity of fundraising practices, and soundness of financial accounting standards. Moreover, securing "national eligibility" was only the first step to participation; once so eligible, respondents, like other groups, had to apply to each local campaign and demonstrate sufficient "local presence" to participate in the local campaign. 5 C.F.R. § 950.405 (a); 407(d), 48 Fed. Reg. 34920-22 (1983).

[5] In addition to respondents, 22 other groups were identified by petitioner as certified for national eligibility only because of the District Court order. CFC Memorandum 83-12 (Sept. 16, 1983).

[6] *Washington Post*, Sept. 20, 1984, p. A17.

on the basis of their litigation activities.' 727 F.2d 1247 (D.C. Cir. 1984), *reprinted at* Ptn. App. 1a. The Court of Appeals concluded that the CFC was not, as petitioner had claimed on appeal, intended by the federal government as a subsidy to participating charities, but as a means of regulating their solicitations of contributions from federal workers. Ptn. App. 14a-15a. It found it unnecessary, however, to decide whether the CFC constituted a "limited public forum." Rather, it concluded that, wherever the CFC fell in *Perry*'s tripartite classification of government-controlled channels of communications, exclusion of respondents on the basis of their litigation activities did not meet *Perry*'s requirement that some speakers could be denied access granted others only on the basis of distinctions "reasonable in light of the purpose which the forum at issue serves." 460 U.S. at 49. On the basis of the record in the case, the Court of Appeals found the petitioner's claimed interests in excluding respondents deficient.[8]

Shortly before seeking review in this Court, petitioner issued in final form new regulations abolishing the national eligibility process at issue in the case and permitting gifts through the CFC to any tax-exempt

[7] Although the exclusionary provisions of the Executive Order applied to "political activity or advocacy, [and] lobbying" as well as litigation, litigation alone would be sufficient to bar an otherwise qualified health and welfare charity. 5 C.F.R. § 950.101(a)(1)(v)(C), 48 Fed. Reg. 34915 (1983). It is on the basis of the respondents' litigation efforts, not the other types of activities (which form a very minor part of their programs and which are sharply restricted by the tax laws for all charities), that they would have been barred from participation.

[8] The specific rationales advanced, and the reasons for the Court of Appeals rejecting them, are discussed below, pp. 16-19.

charity. 49 Fed. Reg. 32735 (Aug. 16, 1984). Although stated to have been issued in response to the court decision here sought to be reviewed, they make changes that go far beyond subjects covered in that decision (e.g., by abolishing the ban on individual charity advertising to encourage CFC gifts), they were adopted after extensive consultation with the United Way and other charities, and they reflect congressional guidelines concerning the future management of the campaign.[9]

REASONS FOR DENYING THE WRIT

Summary

The decision below depends on a purely factual finding—that respondents provide and support health and welfare services. It simply holds that they cannot constitutionally be excluded from the CFC, for which other health and welfare charities are eligible, merely because they provide their health and welfare benefits partly by litigation. It does not, contrary to suggestions in the Petition, hold that all tax-exempt charities must be admitted to the CFC, much less purport to change the standards by which to measure the propriety of limiting speakers' access to government property generally. In any case, the issue litigated below now is of no practical significance because petitioner, since the Court of Appeals decision, has issued new regulations abolishing the national eligibility process with which this case is concerned and making other fundamental changes in the CFC.

[9] Although the preamble to the new regulations states that they are subject to modification at the direction of a court, Congress or the President, petitioner has not represented to this Court, or otherwise, that he will reinstitute a national eligibility process if this Court reverses the decision below. See Ptn. 7 n.7.

Discussion

1. *The decision below depends on a factual finding that respondents are health and welfare charities.* The Petition barely mentions the critical factual basis of both the District Court's and the Court of Appeals' holdings, namely their judgments, based on the record, that respondents are in fact health and welfare charities that differ from so-called "traditional" health and welfare charities only because they use litigation as a means to achieve their health and welfare objectives. The factual similarity of objectives and benefits between respondents and eligible charities lies at the heart of the decision below, for it makes clear that the issue is not (as petitioner suggests) whether the CFC must be opened to all charities, but whether certain charities whose objectives are identical to charities *included* in the CFC can be *excluded* because they use litigation as a method of achieving those objectives.

Contrary to the Petition's implication (Ptn. 10-11, 24) that the Court of Appeals found respondents to be "similarly situated" to eligible groups solely because they share a common basis for tax exemption in 26 U.S.C. § 501(c)(3), the court stressed that the respondents shared common health and welfare purposes and benefits with the preferred groups.[10] It summed up its

[10] In this connection, the Court of Appeals pointed to the inclusion of the U.S. Olympic Committee and a number of conservation groups. Ptn. App. 22a. Petitioner suggests (Ptn. 18 n.17) that, if he had realized the significance the Court of Appeals would attach to the point, he could have shown that the Olympic Committee serves health and welfare purposes. Apart from the procedural belatedness of this proffer (also made in his rejected petition for reconsideration by the Court of Appeals), it misses the point. The

"similar situation" analysis by saying, "In short, both in terms of their longstanding treatment under the tax code and the parameters of the CFC as it has traditionally been understood, the status of the [respondents] and the included charities is virtually identical." Ptn. App. 22a."

That finding was based on the record in the District Court and is not an appropriate matter for review in this Court. All respondents have submitted affidavits

Court of Appeals based its analysis not on a conclusion that other participating groups did *not* provide health and welfare benefits, but on its conclusion that respondents *did* provide such benefits. Petitioner has no basis to claim surprise on this issue. Respondents had contended that their work served health and welfare purposes from the initial stage of the action and had supported it by affidavits. The petitioner had not disputed it, contending only that respondents' qualification under the Executive Order—which included the litigation provisions—was uncertain. II J.A. 463.

[11] The Court of Appeals' reference to the tax code as a source of guidance on permissible advocacy activity by charities was appropriate. As this Court has recently observed in *Regan* v. *Taxation With Representation*, —— U.S. ——, 103 S.Ct. 1997 (1983), the provisions of section 501(c)(3) and 501(h) reflect a congressional judgment of how much political activity is consistent with tax-exempt charity status. Treasury Regulations recognize "defense of civil or human rights protected by law" as a legitimate charitable activity. 26 C.F.R. § 1.501(c)(3)-1(d)(2). The Internal Revenue Service has recognized the charitable status of so-called public interest law firms since shortly after they were first established. Rev. Proc. 71-39, 1971-2 C.B. 575. This statutory and administrative recognition of the legitimacy of the methods used by respondents buttresses the conclusion that, given their health and welfare objectives, they cannot constitutionally be disadvantaged in access to government-controlled channels of communication simply because of those methods.

showing how their litigation and other activities served health and welfare purposes.[12] The petitioner in opposing respondents' motion for summary judgment claimed only that it was not clear whether respondents met the requirements of the Executive Order;[13] he did not dispute even in conclusory terms (nor does he do so now) that the respondents' work produces health and welfare benefits.[14]

The factual similarity of respondents to health and welfare charities that have traditionally been in the CFC and were eligible under the Executive Order forms the foundation both of the correctness of the decision below and of its limited general significance. Under *Perry* "the touchstone for evaluating . . . distinctions [in access to nonpublic forums] is whether they are reasonable in light of the purpose which the

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[12] The Petition's statement that "the litigation efforts of *one* respondent had resulted in benefits to needy people" (Ptn. 11) (emphasis added) misreads both the Court of Appeals opinion and the record. The Court of Appeals expressly noted that not only the NAACP Legal Defense and Educational Fund, but the other groups as well had submitted affidavits showing their services to the needy and to the protection of public health. Ptn. App. 25a n.13.

[13] II J.A. 463. Prior to promulgation of regulations, it was not clear how much litigation and other "advocacy" activity would result in exclusion. The regulations, proposed a few days before the District Court decision and adopted in final form on August 1, 1983, provide that if 15% of the budget of a health and welfare group was spent for litigation, lobbying, or attempting to influence executive branch action, the group could be excluded. 5 C.F.R. § 950.101(a)(2), 48 Fed. Reg. 34915 (1983).

[14] The opponent of a motion for summary judgment has an obligation to identify material issues in dispute and advance specific facts supporting his contention. Fed. R. Civ. P. 56(e).

forum at issue serves." 460 U.S. at 49. The Court of Appeals found this case factually different from *Perry* in terms of the nature of the forum and the excluded speakers' relation to it. In *Perry*, the purpose of the forum was to aid internal management of the schools and, from that point of view, the status of the excluded speaker—an unrecognized union—was fundamentally different from that of the recognized bargaining agent that used the school mail facilities at issue. 460 U.S. at 47, 49. Here, by contrast, the Court of Appeals concluded that the record showed that the purpose of the CFC was to allow certain charities to solicit funds and that respondents, in addition to being recognized as charities for tax purposes, provided and supported direct health and welfare services, so that "the status of the [respondents] and the included charities is virtually identical." Ptn. App. 22a. Since respondents are, and were found on the basis of the record to be, health and welfare charities, their status *vis-a-vis* the CFC and its purpose is identical to the groups granted eligibility by the Executive Order.

The Court of Appeals applied the settled law of this Court when it observed that in situations where some are allowed to speak, highly similar speakers may not be excluded, even from a nonpublic forum,[15] unless

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[15] While the Court of Appeals did not reach the question, it is clear under *Perry* that the CFC (viewed either as a forum in itself or as a limited use of the federal workplace for communication) qualifies as a "limited public forum," at least for health and welfare charities. In *Perry*, the school mail facilities were open to certain charities of interest to students, like the Cub Scouts and YMCA. The Court noted that the mail facilities might be a "limited public forum" for "other entities of similar character," i.e., other

the exclusion reasonably serves a legitimate government interest in preserving the purpose of the forum. In *Perry*, for example, this Court noted "[W]hen speakers and subjects are similarly situated, the State may not pick and choose. 460 U.S. at 55.

2. *The practical effects of the decision are sharply limited.*

a. The Petition's suggestion (Ptn. 24) that the decision implies that the federal government must "assume the role of publicity and collection agent for all tax exempt organizations," simply ignores what the Court of Appeals held. Its decision that respondents were "similarly situated" to other health and welfare charities from the point of view of the purpose of the CFC rested not, as the Petition implies, only on their

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organizations of interest to students. 460 U.S. at 48. The CFC is exactly analogous. Since the federal government has created in the CFC a limited public forum for health and welfare charities, there must be not merely a reasonable, but a compelling, basis for content-based restrictions on access.

Petitioner half-heartedly suggests (Ptn. p. 14-15 n. 14) that he has "some doubt" whether the CFC is a forum at all. His contention that the CFC is somehow a governmental subsidy and not a forum for charities to communicate flies in the face of the fact that the CFC has been repeatedly described by government officials as a method of charitable solicitation—an activity protected by the First Amendment, *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980)—and that it involves circulation to millions of federal employees of charity-written descriptions of their activities. The contention that the CFC is a subsidy was extensively argued, and squarely rejected, below (Ptn. App. 14a-17a) and appears not to be revived in the Petition as a basis on which review is sought in this Court.

tax status, but on the health and welfare benefits respondents provide. Only charities able to make such a showing as to the health and welfare nature of their programs come within the decision, so the image of a CFC inundated by 300,000 participants is wildly exaggerated.[16]

b. The Petition repeats (Ptn. 24) the same speculations of disruption of the CFC that the Court of Appeals rejected and declares that "implementation of the decision below will result in a significant decrease in the success of the Campaign." That assertion is not only absolutely unsupported in the record; it is contradicted by the actual experience of steadily increasing financial success of the last three campaigns (see p. 5 above).

c. Contrary to petitioner's assertion (Ptn. 16, 25), the Court of Appeals did not apply a more demanding standard than required in *Perry*. *Perry*'s dual requirement is that distinctions in access to a nonpublic forum be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." 460 U.S. at 46. The Court of Appeals concluded on the record that these tests were not satisfied here.

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[16] Even admission of *all* litigating groups would not "inundate" the CFC. While the Petition (Ptn. 24 n.25) is correct that the IRS lists some 300,000 section 501(c)(3) charities, its most recent survey of charities (based on analysis of 1975 returns) reported that there were only 40 groups in the category of "litigation" other than legal aid. By contrast, there were over 30,000 groups that come within the "traditional" health and welfare categories (health services, youth, housing, inner city, legal aid, other individual aid, and United Fund). *IRS Statistics of Income Bulletin* No. 2, Table 2, 11-16 (Fall 1981).

Both respondents and charities not using litigation were, it found, health and welfare charities, so that the clear difference in status of speakers *vis-a-vis* the purpose of the forum that existed in *Perry* was not present. It therefore examined "with some care" the claim that, despite the similarities between respondents and other health and welfare charities, preference for the latter was still reasonable. It took pains to emphasize that "the inquiry we have delineated is demanded by the similarities between the included and excluded charities in this case" and would not be appropriate where such similarity were lacking. Ptn. App. 24a. Thus, the conceptual basis of the Court of Appeals' analysis as well as its particular results were entirely consistent with *Perry*.

3. *Petitioner has since abolished the national eligibility process of which the exclusionary rules invalidated below were a part.* Since the Court of Appeals' decision, petitioner has made fundamental changes in the regulations governing the CFC, which make any further review of that decision of largely abstract interest. The new CFC regulations, proposed in April, 49 Fed. Reg. 14752 (Apr. 13, 1984) and adopted in final form in August, 5 C.F.R. Part 950, 49 Fed. Reg. 32735 (Aug. 16, 1984), not only drop the "advocacy" restrictions invalidated below, they entirely abolish the national eligibility process of which those restrictions were a part. 49 Fed. Reg. 14752 (Supplementary Information) (national eligibility process "eliminated"). Employees may now give to any tax-exempt charity through the CFC. 5 C.F.R. § 950.521(e)(1)(v), 49 Fed. Reg. 32750 (1984). The new regulations leave to local campaigns and, to some degree, groups of charities, the task of listing possible donees. 5 C.F.R. § 950.-

521(e)(2) and (3). Henceforth, charities that apply to local campaigns will be listed by name only, or, if the local CFC chooses not to have such a list, the CFC materials will include a report prepared by the PCFO describing all groups that received gifts the previous year.

The changes go far beyond anything addressed, much less required, by the decision at issue here.[17] OPM review of participants' financial integrity, fund-raising practices, breadth of support, and public accountability—none of which was in any way questioned in this case—are all abolished. Moreover, the new regulations, in exchange for ending the prior practice of having each local CFC circulate solicitation materials that include a brief description of each participant, lift the ban on charities attempting to solicit CFC gifts through the general media and by direct mail and affirmatively encourage such solicitation. 5 C.F.R. § 950.521(b).

The new regulations produce nothing less than a revolution in the CFC. While petitioner stated that he issued the new regulations subject to modification if "a court, the Congress or the President" so directs, 49 Fed. Reg. 32735 (1984) (Supplementary Information), he has not represented to this Court or otherwise that he would restore the national eligibility

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[17] Last year, the CFC was conducted within the framework of the regulations issued on August 1, 1983. Petitioner, in ruling on national eligibility, simply identified those few groups which he judged would have been excluded had he been free to apply the Executive Order 12404 exclusionary rules. The campaign was an unprecedented success, so drastic revision of the workable interim system used last year pending further judicial review was not necessary.

system under any circumstances. Further, the new regulations' treatment of the eligibility issue—which is the part of the CFC at issue here—reflects not merely petitioner's proposals, but also a congressional directive. S. Rep. No. 98-562, 98th Cong., 2d Sess. 70 (Jul. 17, 1984) (guidelines for soliciting materials and for permitting gifts to any section 501(c)(3) public charity).

In light of the drastic changes in the CFC regulations, the Court of Appeals decision is now of no continuing practical significance. After the abolition of any national eligibility process, the issue of what limits could constitutionally be placed on national eligibility no longer arises, and the possibility that petitioner might choose to reinstitute the process he has just eliminated is insufficient to make this other than an abstract issue. *Princeton University* v. *Schmid,* 455 U.S. 100 (1982) *(per curiam).*

4. *The Court of Appeals conformed fully to the standards set by this Court when it rejected as unreasonable claims that excluding respondents served the purpose of the forum.*

a. The principal purpose claimed for the exclusion of litigation groups was that they were so "controversial" that their inclusion would be disruptive of government work or jeopardize the success of the CFC. This Court has long recognized the dangers of the "heckler's veto"—or its less colorful cousin, "controversiality"—as a valid basis for restricting speech. *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *Police Dept.* v. *Mosley,* 408 U.S. 92, 96 (1972). *Cf. Bolger* v. *Youngs Drug Products,* —— U.S. ——, 103 S.Ct. 2875, 2883 (1983) ("offensiveness"). Moreover, this Court has recognized that use of judicial processes to enforce legal

rights is itself an important First Amendment freedom. *NAACP* v. *Button,* 371 U.S. 415 (1963).

The Court of Appeals was only reflecting these concerns when it expressed uneasiness at the idea that "controversiality" could be a reasonable basis for exclusion.[18] However, it declined to adopt the absolute District Court position that it is *per se* an impermissible ground. Instead, it examined the record and concluded that there was no evidence of workplace disruption, additional costs to the government for its part in the CFC, or of interference with the success of the CFC. In the circumstances of the case and in light of the clear evidence of lack of disruption, it was appropriate to expect the government to show some real—and not merely speculative—chance of danger from objectors before accepting the alleged "controversiality" of a speaker as a reasonable basis for exclusion. *Police Dept.* v. *Mosley,* 408 U.S. at 101; *Tinker* v. *Des Moines School District,* 393 U.S. 503, 508 (1969).[19]

b. Petitioner also advanced the related claim that permitting groups like respondents to solicit through the CFC would create an impression of government endorsement of the "advocacy" participants or of

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[18] Uneasiness was especially appropriate here, given petitioner's repeated efforts to exclude respondents on a shifting variety of grounds. These efforts were outlined by the Court of Appeals at Ptn. App. 7a-11a.

[19] Petitioner suggests (Ptn. 21) that he met the burden of showing that objections to respondents' participation in the CFC posed a danger to the purpose of the CFC merely by showing that there were in fact objectors, without any showing of their effect. That would amount to simply enshrining the heckler's veto, at least where the government officials hearing the objections were sympathetic to their content.

"politicization" of the CFC. This Court has recently rejected a claim that exclusion of a class of speaker from a forum can be justified solely on the ground of avoiding apparent endorsement. *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1982). The Court of Appeals noted that the lack of evidence of impact of "controversial" groups on the CFC or the federal workplace refuted this contention as well.[20] In any case, it found the exclusion could not be justified by a need to avoid apparent government endorsement of "political advocacy," for the mere fact that the respondents' work had a particularized focus on minorities or pollution and used litigation to advance their ends could not sustain such a classification, since both are hallmarks of many other charities that were eligible, notably legal aid societies. Ptn. App. 21-27a.[21]

c. Finally,[22] petitioner argues that the Court of Appeals wrongly rejected as irrelevant his contention

[20] Since under the District Court injunction, respondents were entitled only to solicit designated funds and had no right to any share of "undesignated" funds given the CFC generally, the Court of Appeals noted that there was no question of respondents' receiving money indirectly from givers who objected to them. Ptn. App. 33a.

[21] Although the Executive Order appeared to make any legal representation of others a bar to participation, the OPM General Counsel had declared at the time the Order was issued that legal aid societies would not be barred if they did not choose cases on the basis of the nature of the claim at issue. II J.A. 433, 461. This, as well as the inclusion of many organizations with specific concerns, such as agencies with a focus on particular diseases, raise serious equal protection questions about the exclusionary provisions of Executive Order 12404.

[22] The Court of Appeals also addressed two other claimed justifications not, apparently, pressed here. First, it found that since

that the existence of alternative forums, such as soliciting federal employees at home, made it reasonable to exclude them from the CFC. What the Court of Appeals held was that in the absence of some reasonable basis for exclusion related to the purpose of the CFC, the existence of alternative means of communications, even if equivalent, could not justify an otherwise unreasonable "picking and choosing" among charities that were allowed to solicit through the CFC.[23]

the respondents provided health and welfare benefits to the needy, they could not reasonably be excluded on the basis of a government policy to insure that CFC gifts went to groups serving the needy. Ptn. App. 24a-25a. Second, it held that a desire to keep the numbers of charities in the CFC within manageable numbers could not justify a content-based preference, especially in light of petitioner's acknowledgement that the numerical impact of the exclusion would be small. Ptn. App. 35a-36a.

[23] The Petition's citations (Ptn. 23) to instances when this Court has said that the availability of alternatives may be relevant to a determination of the reasonableness of an exclusion misses the point. In the cases cited by the petitioner, there were sound reasons, independent of alternatives, for the distinctions drawn. *See, e.g., Perry*, 460 U.S. at 53 (reasonableness of limitation "also supported" by existence of substantial alternative channels). The Court of Appeals held only that the mere existence of alternatives could not alone make reasonable an exclusion based on distinctions for which there was "no reasonable explanation." Ptn. App. 36a. The Petition criticizes the Court of Appeals for failure to cite authority for its observation that the existence of other channels of communication would not in itself excuse the lack of a reasonable basis for selectively excluding respondents. Statements of this Court in support of that—seemingly hard to dispute—proposition include *Schneider* v. *State*, 308 U.S. 147, 163 (1939), and *United States* v. *Grace*, —— U.S. ——, 103 S.Ct. 1702, 1709 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

*CHARLES STEPHEN RALSTON
JULIUS LEVONNE CHAMBERS
99 Hudson Street
10th Floor
New York, New York 10013
(212) 219-1900

WALTER B. SLOCOMBE
GEOFFREY JUDD VITT
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 862-5000

BORIS FELDMAN
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-3607

M. CAROLYN COX
WILMER CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-4103

Attorneys for Respondent

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**Counsel of Record*